(4)

FILED
AUG 3 0 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-8820

In the
Supreme Court of the United States

GARY LAWRENCE,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

James R. Houts
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

August 30, 2006

(Additional counsel for amici curiae are listed inside the front cover.)

BEST AVAILABLE COPY

ADDITIONAL COUNSEL

MIKE BEEBE
ATTORNEY GENERAL
STATE OF ARKANSAS
200 Tower Bldg.
323 Center Street
Little Rock, AR 72201-2610

BILL LOCKYER
ATTORNEY GENERAL
STATE OF CALIFORNIA
1300 I St., Suite 1740
Sacramento, CA 95814

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
5th Floor
Denver, CO 80203

CARL C. DANBERG
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801

THURBERT E. BAKER
ATTORNEY GENERAL
STATE OF GEORGIA
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720-0010

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
100 W. Randolph Street
12th Floor
Chicago, IL 60601

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
302 W. Washington Street
Indianapolis, IN 46204

TOM MILLER
ATTORNEY GENERAL
STATE OF IOWA
1305 East Walnut Street
Des Moines, IA 50319

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

GREGORY D. STUMBO
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY
State Capitol, Suite 118
700 Capitol Avenue
Frankfort, KY 40601

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
207 West High Street
Jefferson City, MO 65101

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
2115 State Capitol
Lincoln, NE 68509-8920

GEORGE J. CHANOS
ATTORNEY GENERAL
STATE OF NEVADA
Nevada Dep't of Justice
100 North Carson Street
Carson City, NV 89701

KELLY A. AYOTTE
ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE
33 Capitol Street
Concord, NH 03301-6397

WAYNE STENEHJEM
ATTORNEY GENERAL
STATE OF NORTH DAKOTA
State Capitol
800 E. Boulevard Avenue
Bismark, ND 58505-0040

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St., 17th Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK
73105-4894

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA
16th Floor, Strawberry Sq.
Harrisburg, PA 17120

HENRY D. MCMASTER
ATTORNEY GENERAL
STATE OF SOUTH
CAROLINA
P.O. Box 11549
Columbia, SC 29211

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
1302 E. Highway 14
Suite 1
Pierre, SD 57501-8501

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHUTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-
2320

ROBERT F. MCDONNELL
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98504-0100

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
State Capitol, Room 26-E
Charleston, WV 25305

QUESTION PRESENTED

Whether AEDPA's statute of limitations is tolled during the time a petition for writ of certiorari brought pursuant to 28 U.S.C. §1257 is pending before this Court after the entry of final judgment in the underlying state-court proceedings.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Because Certiorari Review Of A State Post-Conviction Proceeding By This Court Does Not Affect—Or Have Anything To Do With—The Exhaustion Requirement, Congress Did Not Intend To Toll AEDPA's Statute Of Limitation During Such Review. 3

II. Petitions For Certiorari Review By This Court Following State Post-Conviction Proceedings Are Filed Not Pursuant To State-Created Post-Conviction Actions But, Rather, Pursuant To Federal Statute. 8

III. The Fact That Petitions For Certiorari Review Following State Post-Conviction Proceedings Do Not Toll AEDPA's Statute Of Limitation Does Not Result In The Deprivation Of This Avenue Of Appellate Review. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Baldwin v. Reese, 541 U.S. 27 (2004) 5

Carey v. Saffold, 536 U.S. 214 (2002) 7, 8

Darr v. Burford, 339 U.S. 200 (1950) 4

Duncan v. Walker, 533 U.S. 167 (2001) 3, 4, 5

Fay v. Noia, 372 U.S. 391 (1963) 4

Johnson v. California, 541 U.S. 428 (2004) 8

Nike, Inc. v. Kasky, 539 U.S. 654 (2003) 8

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 7

Pennsylvania v. Finley, 481 U.S. 551 (1987) 4

Rhines v. Weber, 544 U.S. 269 (2005) 10

Rose v. Lundy, 455 U.S. 509 (1982) 4, 5

Ulster County Court v. Allen, 442 U.S. 140 (1979) 4

Williams v. Taylor, 529 U.S. 420 (2000) 3, 4

Statutes

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ..... passim

28 U.S.C. §1257 ..... passim

28 U.S.C. §2244(d) 5, 6, 9

28 U.S.C. §2244(d)(2) 3, 4, 5

28 U.S.C. §2254 7

28 U.S.C. §2254(b) 5, 6, 7

28 U.S.C. §2254(c) 7

Other Authorities

142 Cong. Rec. S.3352, S.3353-54 (1996) (statement of Sen. Hatch) 5

142 Cong. Rec. S.3443 (1996) (Statement of Administration Policy introduced as Exhibit by Sen. Moynihan) 6

INTEREST OF AMICI

The *amici* States provide prisoners with opportunities to challenge their convictions and sentences through processes governed by state law and procedural rules. *Amici* have implemented these post-conviction procedures to obtain the first opportunity to correct any and all alleged federal constitutional deficiencies. *Amici* have a vested and acknowledged interest in defending final criminal judgments, as well as in exercising their duty under the Constitution to correct errors in appropriate cases.

The position advocated here by Lawrence directly implicates these interests by extending AEDPA's statute of limitations without respect to either the purpose of AEDPA's tolling provision or the compelling interest in finality.

SUMMARY OF THE ARGUMENT

AEDPA's tolling provision is inextricably intertwined with the habeas statute's exhaustion requirement. Lawrence's position here - which would require tolling for certiorari petitions to this Court pursuant to 28 U.S.C. §1257 - bears no relationship to the balance between exhaustion of state-court remedies and the limitations period that underlies the tolling provision itself.

Furthermore, certiorari proceedings in this Court are filed pursuant to federal statute, §1257, and are limited to the review of "final judgments or decrees" of state courts. Accordingly, §1257's grant of jurisdiction is only available *after* the state-court proceedings have come to a close. Lawrence's position is fatally flawed inasmuch as he wishes to use as the basis for tolling AEDPA's statute of limitations a *federal*-court proceeding brought pursuant to *federal* statute. Because AEDPA's tolling provision is limited to pending *state*-court proceedings, Lawrence's argument must fail.

Importantly, affirming the judgment below will not result in the loss of §1257 certiorari review as a potential avenue for state prisoners. An affirmance will do nothing but deprive Lawrence of a federally-subsidized application for discretionary review by this Court. Because certiorari review in this Court is not necessary for exhaustion, however, there is no basis for insisting on tolling the statute of limitations during the pendency of a certiorari petition filed under §1257.

ARGUMENT

I. Because Certiorari Review Of A State Post-Conviction Proceeding By This Court Does Not Affect—Or Have Anything To Do With—The Exhaustion Requirement, Congress Did Not Intend To Toll AEDPA's Statute Of Limitation During Such Review.

The purpose of the Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA's") tolling provision is to balance "the interests served by the exhaustion requirement and the limitation period." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). As this Court noted in *Duncan*, the tolling provision

> promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, §2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts.

Id. at 179-80. This relationship between the exhaustion requirement and AEDPA's limitation period fatally undermines Lawrence's position.

AEDPA's purpose is "to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Accordingly, habeas principles must be shaped by the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts," requiring care "to safeguard the States' interest in

the integrity of their criminal and collateral proceedings." *Id.* It is this concern for comity—and for ensuring the integrity of state criminal and collateral proceedings—that gives rise to the federal habeas statute's exhaustion requirement. *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'") (citing *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Because fairness, in the light of the habeas statute's exhaustion requirement, warranted §2244(d)(2)'s tolling language in the first place, there is no basis for concluding that certiorari review in this Court at the conclusion of state post-conviction proceedings—review that is itself not required for proper exhaustion[1]—falls within the scope of the AEDPA's tolling provisions.

In *Duncan*, this Court emphasized that the phrase "State post-conviction or other collateral review," as used in 28 U.S.C. §2244(d)(2), refers *only* to state-court proceedings. These proceedings, voluntarily initiated by prisoners challenging the validity of their convictions, sentences, or confinements, are brought as state-law causes of action. *Cf. Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."). While States are not

---

[1] *See Ulster County Court v. Allen*, 442 U.S. 140, 149 n.7 (1979) (citing *Fay v. Noia*, 372 U.S. 391, 435-38 (1963)) (certiorari petition from denial of state post-conviction relief not part of habeas exhaustion process).

constitutionally obliged to offer opportunities for post-conviction review, when States do offer such review, state prisoners must present their federal claims for state court consideration—*i.e.*, must "exhaust"—prior to pursuing federal habeas corpus relief. *See* 28 U.S.C. §2254(b); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Rose v. Lundy*, 455 U.S. 509 (1982). The exhaustion requirement -- which again, pertains to state-court proceedings only -- necessitated §2244(d)'s tolling provisions.

In *Duncan*, again, this Court recognized that "§2244(d)(2) promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Duncan*, 533 U.S. at 178. Understanding Congress' intent to promote the exhaustion of *state* remedies, and recognizing that §2244(d)(2)'s tolling language applies only to applications for "State post-conviction or other collateral" review, it is plain that Congress also intended to limit the tolling period to the *state*-court proceedings concerning such applications. It is, again, only the state-court proceedings that are required in order for a state prisoner to properly exhaust his federal claims so as to be entitled to pursue habeas corpus relief.

During the Senate debate on the habeas provisions of the AEDPA - and, indeed, just before the conference report was approved and the law was created - Senator Hatch echoed President Clinton's concern that "it should not take 8 or 9 years *and three trips to the Supreme Court* to finalize whether a person, in fact, is properly convicted or not.'" 142 Cong. Rec. S.3352, S.3353-54 (1996) (statement of Sen. Hatch) (emphasis added). The next day, an excerpt from a Clinton Administration Policy Statement was read into the record. It stated, in part:

> The Administration has consistently and strongly supported habeas corpus reform in order to assure that criminal offenders receive swift and certain punishment. Indeed, the Administration believes that the bill could be improved to provide additional guarantees that offenders have only "one bite at the

> apple" and complete the process even more expeditiously... H.R. 2703 should shorten the duration and reduce the number of reviews for each criminal conviction while preserving the full scope of habeas review so that it can continue to serve its historic function as the last protection against wrongful conviction.

142 Cong. Rec. S.3443 (1996) (Statement of Administration Policy introduced as Exhibit by Sen. Moynihan).

These statements support this Court's previous holdings that AEDPA's tolling provisions are designed to move state prisoners expeditiously into federal habeas corpus review to advance the States' interest in preserving the validity of final criminal convictions. In Senator Hatch's words, it should not take "three trips to [this Court] to finalize" a state prisoner's conviction. The language of the AEDPA makes clear that the first opportunity for review by this Court - *i.e.* at the conclusion of the direct appeal process - was not the basis for Senator Hatch's statement, as the statute of limitation does not begin to run until after this Court's direct-appeal review is completed. Further, Congress did nothing to restrict the ability of unsuccessful habeas petitioners to seek relief in this Court at the conclusion of the federal habeas appeals process. Instead, in enacting AEDPA, Congress targeted the discretionary second-trip (so to speak) review of final judgments in state post-conviction proceedings brought under 28 U.S.C. §1257. Congress did not take away this avenue of appeal entirely (*see infra* at 9-10) but rather simply refused to count the time such a discretionary appeal is pending against the State (and in favor of the person in State custody) under AEDPA's statute of limitation.

Because AEDPA's exhaustion requirement was the primary consideration behind §2244(d)'s tolling provisions, the exhaustion requirement itself, as described in 28 U.S.C. §2254(b), should inform this Court's understanding of AEDPA's tolling provision. AEDPA's exhaustion

requirement consistently refers to exhaustion in terms of seeking relief in the "courts of the State." 28 U.S.C. §§2254(b)(1)(A), 2254(b)(2), and 2254(c). By specifically referencing remedies available in the "courts of the State," Congress signaled that it had no concern for the ability of applicants to proceed at the close of state processes before this Court pursuant to 28 U.S.C. §1257. By the same token, Congress expressed no concern with state prisoners failing to "exhaust" state remedies by seeking review in this Court.

In *Carey v. Saffold*, 536 U.S. 214, 220 (2002), the fear of producing a "serious statutory anomaly" led this Court to reject California's interpretation of AEDPA's tolling provision as it applied to California's unique post-conviction process. This Court specifically emphasized that a §2254 federal habeas petitioner fails to exhaust his remedies as long as he maintains "'the right under the law of the State to raise' *in that State*, 'by any available procedure, the question presented.'" *Saffold*, 536 U.S. at 220 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)) (emphasis added). Lawrence's interpretation of *Saffold* here is flawed both because it fails to account for the singular importance of state-court review ~~and because~~ it treats §1257 certiorari proceedings in this Court *following* state post-conviction processes as *part* of the state process, rather than as a separate review pursuant to a federal statutory grant of authority under §1257. Lawrence's suggestion that "the process of seeking certiorari [is] an equally significant extension of the proceedings on the original [state court] application" (Pet. Br. 18) is, with respect, question-begging and is irreconcilable with this Court's consistent emphasis on the importance of exhaustion of *state* remedies in *state* court proceedings.

Because AEDPA's tolling provision is concerned with securing for potential federal petitioners the opportunity to present and exhaust claims through the procedures offered by individual States, this Court should reject Lawrence's attempt to shield *federal*-court review brought pursuant to

federal statute (*i.e.*, 28 U.S.C. §1257), under AEDPA's tolling provision. To hold to the contrary would defeat the purpose of AEDPA by allowing the presentation of federal claims to a federal court to toll the time for presenting the very same federal claims to other, arguably more appropriate, federal courts. Such a scenario would be equally anomalous as the scenario this Court sought to avoid in *Saffold*.

II. Petitions For Certiorari Review By This Court Following State Post-Conviction Proceedings Are Filed Not Pursuant To State-Created Post-Conviction Actions But, Rather, Pursuant To Federal Statute.

Persons in state custody, of course, have the right to petition this Court for certiorari review following the denial of a state post-conviction application for relief. But that right does not arise under any state-created process, but rather under the congressional grant of §1257 jurisdiction. As this Court reiterated in *Johnson v. California*, 541 U.S. 428, 429 (2004), jurisdiction under §1257 is limited to review of "final judgments or decrees" from the highest court of a State in which a judgment could have been had. The previous year, in *Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003), this Court likewise emphasized that such review is based on a congressional grant of jurisdiction to review state-court judgments *after they become final*. Thus, upon the final denial of state post-conviction relief, further review is permitted only to the extent provided by the congressional grant of jurisdiction under §1257. The fact that petitions for certiorari to this Court following the denial of state post-conviction relief are limited to final judgments demonstrates that such proceedings are qualitatively different from the state post-conviction procedure set up under state law and, instead, are creatures of federal statute.

Accordingly, there is no basis for this Court to conclude that proceedings under §1257 following the denial of a state application for post-conviction relief are part of a "properly filed application for State post-conviction" review. By the time this Court gains jurisdiction to review such a petition

for writ of certiorari, the State post-conviction process has reached its terminus.

III. The Fact That Petitions For Certiorari Review Following State Post-Conviction Proceedings Do Not Toll AEDPA's Statute Of Limitation Does Not Result In The Deprivation Of This Avenue Of Appellate Review.

While Congress did not intend to subsidize, as it were, petitions for certiorari review by this Court following final judgments in state post-conviction proceedings by tolling the habeas corpus statute of limitation during the pendency of the certiorari process, this avenue of review remains available. Congress simply (and sensibly) acted to get litigants expeditiously into federal habeas corpus proceedings as soon as possible following the conclusion of state post-conviction review.

Under 28 U.S.C. §1257, state prisoners can, of course, continue to present federal constitutional questions to this Court upon the completion of state post-conviction proceedings in state courts. Again, however, such review is not sought pursuant to a state post-conviction review process but, instead, pursuant to jurisdiction granted this Court by federal statute. The fact that prisoners may seek certiorari review pursuant to a federal statute, however, does not require tolling of the AEDPA statute of limitations, as this review has absolutely no effect on AEDPA's exhaustion requirement. Congress' acknowledged intent in enacting AEDPA was to decrease the amount of time required for state prisoners to proceed through the three levels of appeal. The only manner in which the "three trips to the Supreme Court" referred to by Senator Hatch can be mitigated as intended by Congress is for the time for seeking such review following state post-conviction proceedings not to toll §2244(d)'s statute of limitation.

While AEDPA's limited tolling provision might theoretically lead to this Court reviewing a final judgment in

a state post-conviction proceeding while the subsequent federal habeas corpus proceeding is ongoing, this fact alone surely does not warrant ignoring the tolling provisions. (Grants of certiorari from State post-conviction proceedings, historically, are quite rare.) This Court already has approved a "stay and abeyance" procedure applicable where "good cause" exists for a habeas petitioner to return to state court to pursue state court remedies. *Rhines v. Weber*, 544 U.S. 269 (2005). Thus, in the exceedingly rare instance in which this Court grants certiorari to review a final judgment in a state post-conviction proceeding, sensible procedures are already in place to accommodate the federal habeas process. First, this Court could grant a stay of its own right. Second, any ongoing federal habeas action simply could be stayed by a federal district court pending review by this Court pursuant to the already approved stay-and-abeyance procedure.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

James R. Houts
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

August 30, 2006